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Supreme Court of the United States

OCTOBER TERM, 1943

No. 1005 87

46TH STREET THEATRE CORP. and
SELECT OPERATING CO. INC.,
Petitioners,

against

ROBERT WM. CHRISTIE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, AND BRIEF IN SUPPORT THEREOF

MILTON R. WEINBERGER,
Counsel for Petitioners.

WILLIAM KLEIN,
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Of Counsel.

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To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners, 46th Street Theatre Corp. and Select Operating Co. Inc., respectfully pray for a writ of certiorari to review the final judgment of the Supreme Court of the State of New York wherein it was adjudged that Chapter 893 of the Laws of 1941 (Section 40-b, Civil Rights Law) of the State of New York, is not repugnant to the Fourteenth Amendment of the Constitution of the United States.

Summary Statement of the Matter Involved

This action was brought to recover a $500 penalty fixed by Section 41 of the Civil Rights Law (Consolidated Laws Chapter 6) for violation of Section 40-b of the Civil Rights Law of the State of New York (Chapter 893 of the Laws of 1941).

Section 40-b of the Civil Rights Law provides that persons or corporations conducting a place of entertainment and amusement of the character later defined, are forbidden to "refuse to admit to any public performance held at such place any person over the age of twenty-one years who presents a ticket of admission to the performance a reasonable time for the commencement thereof; * * * but nothing in this action contained shall be construed to prevent the refusal of admission to * * * any person whose conduct or speech thereat or therein is abusive or offensive or of any person engaged in any activity which may tend to a breach of the peace. The places of public entertainment and amusement within the meaning of this Section shall be legitimate theatres, burlesque theatres, music halls, opera houses, concert halls and circuses."

Respondent purchased a ticket of admission to the 46th Street Theatre in New York City for the evening performance of May 27, 1941 of the musical production "Panama Hattie." When respondent sought to enter the theatre, admission was refused him by petitioners who are the owners and operators of said theatre. Petitioners offered to refund the purchase price. In the action instituted by respondent to recover the penalty provided by Section 41, Civil Rights Law, petitioners admitted the allegations of the complaint as to the refusal to admit respondent, that respondent's conduct or speech was not abusive or offensive, that respondent was not engaged in any activity which

might tend to a breach of the peace. Petitioners pleaded affirmatively that Section 40-b of the Civil Rights Law was unconstitutional as being in contravention of the Fourteenth Amendment of the Constitution of the United States (fol. 21).

The action was tried before the Supreme Court of the State of New York, County of Schenectady, without a Jury. It was proved that during the past thirty-five years or so there had been but two or three isolated instances of exclusions of ticket holders from legitimate theatres in New York (fols. 62-65; 67-70; 78-80; 88-89). There never prevailed any general condition of exclusion of ticket holders (fols. 145-150). The Trial Justice held the statute constitutional. He rendered judgment for the plaintiff and in his opinion, a copy of which is appended hereto, said:

> "The facts are not disputed, but the defendants insist that there can be no recovery herein because of the unconstitutionality of Section 40-b of the Civil Rights Law."

Judgment was entered in the Supreme Court, County of Schenectady, on December 20, 1941 in favor of plaintiff. Upon appeal to the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department, that Court unanimously affirmed. In its opinion, a copy of which is appended hereto, and which is reported in 265 App. Div. 225, the Court said:

> "Appellants attack the constitutionality of the statute, urging that it violates their rights to equal protection guaranteed by the Fourteenth Amendment to the Constitution of the United States * * *."

Judgment of affirmance was entered in the Supreme Court, County of Schenectady, on January 5, 1943. Appeal from the aforesaid judgments was taken to the Court

of Appeals of the State of New York, the highest Court in the State in which a decision in the suit could be had, as a matter of right upon the ground that the Constitution of the United States was involved (Section 588, Civil Practice Act of the State of New York). The Court of Appeals affirmed the judgments appealed from without opinion (292 N. Y. 520). The order of affirmance dated February 24, 1944 was made the order of the Supreme Court by order dated March 20, 1944, and judgment of affirmance was entered in the said Supreme Court on March 20, 1944. It is from the determination of the Court of Appeals that petitioners pray for a writ of certiorari.

The sole question sought to be reviewed by this Honorable Court is whether a State, may, by statute, require operators of legitimate theatres, and similar places of entertainment to admit all adult persons, in absence of offensive conduct, and presenting tickets of admission a reasonable time before the commencement of the performance, without imposing a similar requirement upon the proprietors of all places of public entertainment, particularly motion picture theatres, where there is no showing that there was either a general evil of refusal of admission, nor that such evil was peculiar to legitimate theatre and similar places of entertainment included in the act.

Jurisdiction

The date of the decision of the Court of Appeals of the State of New York of which review is here sought, is February 24, 1944. The original remittitur is dated February 24, 1944. The remittitur was thereafter amended by order of the Court of Appeals dated April 13, 1944. An order making the order of affirmance of the Court of Appeals the order of the Supreme Court of the State of New York was

entered in the Supreme Court on the 20 day of March, 1944. Judgment on the remittitur was entered in the Supreme Court of the State of New York on the 20 day of March, 1944.

The statute granting the power to review herein is Judicial Code, Section 237(a)(b), United States Code, Title 28, Section 344(a)(b). There is here involved the constitutionality of Section 40-b of the Civil Rights Law of the State of New York, Chapter 893 of the Laws of 1941 of the State of New York. The statute is set forth at length in the appendix. The amended remittitur of the Court of Appeals recites that "A question under the Federal Constitution was presented and necessarily passed upon by this Court. The appellant contended that Chapter 893 of the Laws of 1941 (Section 40-b, Civil Rights Law) of the State of New York is repugnant to the Fourteenth Amendment of the Constitution of the United States. This Court held that the aforesaid law is not repugnant to the Fourteenth Amendment of the Constitution of the United States."

A final judgment has been entered in this cause by the Supreme Court of the State of New York on remittitur of the Court of Appeals of the State of New York, the highest Court of the State of New York, in which a decision in the suit could be had.

Reasons for Issuance of Writ

(1) The Court of Appeals of the State of New York has decided a highly important case in which it necessarily passed upon the question of whether the State statute was repugnant to the Fourteenth Amendment of the Constitution of the United States. There is presented a matter of

the greatest importance to legitimate theatrical interests and other similar interests specified in the statute, involving investments of millions of dollars. Petitioners claim that legitimate theatres have been discriminated against in favor of places of entertainment excluded from the Act.

(2) This was the first time that this question was presented to the State Court of Appeals and if this Court grant certiorari it will be the first time that this Court will consider the question of whether the State statute is repugnant to the Fourteenth Amendment of the Constitution of the United States.

(3) The decision of the Supreme Court of the State of New York, as affirmed by the decision of the Court of Appeals of the State of New York is in conflict with decisions of this Court and in petitioners' opinion directly in conflict with the decision in this Court in *Western Turf Association* v. *Greenberg*, 204 U. S. 359.

46TH STREET THEATRE CORP.
and
SELECT OPERATING CO. INC.,
Petitioners

by MILTON R. WEINBERGER,
Counsel.

Supreme Court of the United States

OCTOBER TERM, 1943

46TH STREET THEATRE CORP. and
SELECT OPERATING CO. INC.,
Petitioners-Appellants Below,

against

ROBERT WM. CHRISTIE,
Respondent Below.

BRIEF IN SUPPORT OF PETITION

Opinions of the Courts Below

The opinion of the Supreme Court, County of Schenectady, granting judgment to the plaintiff, is not officially reported, but it is found on pages 55 to 58 of the Record. The opinion of the Supreme Court, Appellate Division, Third Department, affirming said judgment, is found on pages 56 to 60 of the Record, and is officially reported in 265 App. Div. 255. The Court of Appeals wrote no opinion, the order of affirmance of the Court of Appeals printed in the Record, and is officially reported in 292 N. Y. 520.

Jurisdiction and Statement of the Case

The jurisdictional basis for the petition and the statement of the case are found in the petition, and for the sake of brevity are not repeated here.

Specification of Errors

(1) The Supreme Court of the State of New York, as well as the Court of Appeals of the State of New York, erred in holding that Section 40-b of the Civil Rights Law of the State of New York was not repugnant to the Fourteenth Amendment of the Constitution of the United States.

(2) The Supreme Court of the State of New York and the Court of Appeals of the State of New York erred in granting judgment to the plaintiff.

ARGUMENT

POINT

Section 40-b of the Civil Rights Law of the State of New York is unconstitutional in that it violates petitioners' rights to the equal protection of the laws guaranteed by the Fourteenth Amendment of the Constitution of the United States.

The Fourteenth Amendment to the Constitution of the United States provides:

> "Nor shall any State * * * deny to any person within its jurisdiction the equal protection of the laws."

It is well settled that a corporation is a person within the purview of the Fourteenth Amendment (*Santa Clara County* v. *Southern Pacific R. Co.*, 118 U. S. 394, 396; *Smyth* v. *Ames*, 167 U. S. 466, 522).

The statutory enactment under attack imposes the duty of admitting all persons, other than those who may be offensive or engaged in an activity tending to a breach of the peace, who present tickets of admission to places of public entertainment and amusement under penalty of a $500 fine for violation thereof (Sections 40-b and 41, Civil Rights Law). One of the evils patent in this act is the express limitation of "place of public entertainment and amusement" to "legitimate theatres, burlesque theatres, music halls, opera houses, concert halls and circuses."

Legitimate theatres are included within the operation of the law. Motion picture theatres are excluded. Circuses are included. Fairs are excluded. Music halls are included. Exhibits at art galleries are excluded. Baseball games, common shows, race tracks are excluded. Radio entertainment is excluded. Neither patently or latently is there any basis for the discrimination fastened upon that portion of the entertainment business as defined and limited by the act.

There is no distinction as a matter of law, or as a matter of business, or as a matter of public policy between the legitimate theatre and the motion picture theatre. The legitimate theatre and the motion picture theatre are both privately owned. Each engages in business as a matter of right and not as a matter of sufferance (*Woolcott* v. *Shubert*, 217 N. Y. 212; *Greater N. Y. Athletic Club* v. *Wurster*, 19 Misc. 443). Each is engaged in presenting entertainment for a profit. Each requires a ticket, purchased upon a uniform scale of prices, for admission.

The legitimate theatre entertains its audience by performance upon the stage by living actors. The motion picture entertains its audience by reproductions of living actors upon a screen. The motion picture theatre however does not restrict its entertainment to the showing of motion pictures. Entertainment by living actors in the larger motion picture theatres is the rule rather than the exception. Vaudeville is today substantially confined to presentation at motion picture theatres. Is there to be one rule of conduct while the motion picture is being flashed upon the screen, and another while the stage presentation is in progress? On the other hand, burlesque theatres entertained their audiences during the intervals between the stage presentations by the showing of motion pictures, news reels, comic shorts and the like.

Neither the legitimate theatre nor the motion picture theatre may be operated without the prerequisite license (Administrative Code of the City of New York, Chapter 32). Each is a place of "public amusement" within the purview of the New York City regulations for protection against fire or panic (Administrative Code of the City of New York, Section C19-154.0-C19-170.0) and within the same Code regulations affecting electrical wiring (Section B30-171.0).

The exhibitions at each, irrespective of the fact that one presents its entertainment upon a screen and the other by living actors on the stage must conform to the same prohibition against immorality and indecency (N. Y. Penal Law, Section 1140-a). Each must conform to the same standards with respect to admission and employment of children (N. Y. Penal Law, Sections 484, 485). Neither may discriminate in the price charged for admission (N. Y. Penal Law, Section 515). Neither may exclude any person by reason of race, color, creed or previous condition of

servitude (N. Y. Penal Law, Section 514; N. Y. Civil Rights Law, Section 40).

In mode and method of doing business the motion picture theatre and the legitimate theatre are the same. Prior to the enactment of the statute under attack neither asked nor received any advantage over the other, or any special privileges. The actors in the legitimate play perform essentially the same services as those in a motion picture. A stage version of a play is essentially the same as a motion picture version of that play. Under the act a legitimate theatre would have to admit everyone, whereas a motion picture theatre across the street which might be presenting a motion picture version of the same play then being presented in the legitimate theatre could deny access. The coincidental run of stage and motion picture versions of the same play in similarly located theatres has often occurred in the case of successful plays. The public health, morals and safety are in no way promoted by encouraging people to go to legitimate theatres and discouraging their going to motion picture theatres, or vice versa. Neither may be deemed a necessity in any greater degree than the other.

Whenever persons, engaged in the same business or in business under like circumstances, are subject to different restrictions or are given different privileges under the same conditions there is present an unequal protection of the laws. The said amendment guaranteed that all persons be equally entitled to pursue their happiness and acquire and enjoy property; that no greater burdens be laid upon one than are laid upon others in the same calling and conditions; that no impediments be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances (*Barbier* v. *Connolly*, 113 U. S. 27, 31; *Louisville Gas Co.* v. *Coleman*, 277 U. S.

32, 37; *Bell's Gap R. R. Co.* v. *Penna,* 134 U. S.
Royston Guano Co. v. *Virginia,* 253 U. S. 412, 41

We do not assert that no classification may
But such classification may only be made within
fined limits. It "must be reasonable, not arbit
must rest upon some ground of difference havi
and substatntial relation to the object of the legi
that all persons similarly circumstanced shall b
alike" (*Louisville Gas Co.* v. *Coleman,* 277 U. S
Merchants Refrigerating Co. v. *Taylor,* 275 N. Y.
Atchison Topeka R. R. v. *Mathews,* 174 U. S. 96, it
at page 104:

> "* * * it is also true that the equal protect
> anteed by the Constitution forbids the legi
> select any person, natural or artificial, an
> upon him or it burdens and liabilities whic
> cast upon others similarly situated. Neith
> make a classification of individuals or cor
> which is purely arbitrary, and impose u
> class special burdens and liabilities. Ev
> the selection is not obviously unreasonabl
> bitrary, if the discrimination is based upo
> which have no relation to the object sought
> complished, the same conclusion of uncon
> ality is affirmed."

Thus it was declared in *Colgate* v. *Harvey,* 269

> "The classification in order to avoid t
> tutional prohibition must be founded upon
> and real differences, as distinguished from i
> and artificial ones. * * * Mere differenc
> enough."

Now let us examine the reasons that the Cou
gave for holding the statute under attack not arbi
not without reason. The Trial Justice in his opi

that "While legitimate theatres and moving picture theatres are both places of amusement, still there exists between the two, essential differences, and I am unable to say that the classification adopted by the Legislature is arbitrary, capricious or unreasonable" (fol. 120). It is apparent that the Trial Justice recognized that the legitimate theatre and the motion picture theatre were engaged in the same calling or at least similarly circumstanced. To hold otherwise would require blinding oneself to realities.

But what are the "essential differences" which the Trial Justice held justified the classification? The Trial Justice was content with his conclusion. He enumerated no points of difference. If there exists such "essential differences" why the reticence of the justice in stating them. The silence is ominous. There are no "pertinent and real differences." The death knell to any claim of difference is clearly sounded when one attempts to draw differences between the legitimate theatre and the motion picture theatre which presents living actors on the stage.

In the Courts below respondent urged as a point of difference that "the price range for tickets is much different." The man who pays $3 or $4 must be admitted to the legitimate theatre. The man who pays $.40 or $1 may be excluded from the motion picture theatre. The act penalizes the exclusion of the former, it sanctions the exclusion of the latter. The implication is abhorrent. The rights of liberty, equality and justice guaranteed by the Federal Constitution are put upon the auction block. Constitutional rights are for sale to the man who can pay for a ticket of admission to a legitimate theatre, they are denied to the one who can't "raise the price." Constitutional rights are not to be abridged by such patent and heinous subterfuge.

The sole basis given by the Appellate Division for the classification and exception is "we may take notice that while there are thousands of movie theatres in the state, there are fewer than fifty so-called legitimate theatres * * *. A film that is being shown in a movie house is being shown at the same time in hundreds of others" (265 App. Div. at p. 258). This is not so. "Gone With The Wind" played in New York City for months at the Astor Theatre and could not be seen anywhere else in the city. "Mrs. Miniver" during its record breaking run at the Music Hall in New York City could not be seen at any other movie house in the city. But even though a motion picture may be playing at hundreds of movie houses at the same time that is small comfort to the patron of the local movie house who cannot, either through lack of conveyance or of financial means or a multitude of reasons, go elsewhere to see the movie. The argument by the Appellate Division in effect says that if a patron cannot see a movie in a rural community it is reasonable to tell him to go to New York City.

It is to be noted that baseball games are not covered by the act, thereby permitting the exclusion of persons from the ball park. Manifestly, a person excluded from a ball park cannot see that game elsewhere. Thus, if the only basis for classification is the fact that a theatrical production cannot be viewed elsewhere, the classification is arbitrary and discriminatory when viewed in the light of the baseball park or the rural movie house.

However, the mere fact that there are numerous movie theatres would not prevent discrimination against any particular patron. Motion pictures are shown at chain houses. If the operators of a picture house circuit desire to exclude a particular person, they can, under the act, exclude him from all their houses, and he would be in no better

position than the plaintiff who was excluded from the 46th Street Theatre, or the baseball fan who is excluded from the ball park. If it is reasonable to tell a movie patron to try elsewhere, even though he cannot do so then it is just as reasonable to tell plaintiff to wait until "Panama Hattie" goes on the road and then try elsewhere. By no stretch of the imagination can the number of any amusement type be deemed the "real and substantial differences" required by law (*Bryant* v. *Zimmerman*, 278 U. S. 63), when admission, which is the object of the legislation, may be denied by one as well as by many.

Manifestly the sole object of the statute is to compel a theatre to grant admission to a ticketholder. The statute is not a basis for any tax imposition. It is not concerned with the right to a license. It is not affected by any consideration of health, morals, education or safety of the public. Article 4 of the Civil Rights Law, which embraces Section 40-b, is entitled "Equal Rights in Places of Public Accommodation and Amusement." Section 40-b is entitled "Wrongful refusal of admission to and ejection from places of public entertainment and amusement." The statute be-speaks solely and exclusively "admission."

The classification is arbitrary and capricious in that it has no relation, substantial or otherwise, to the object of the legislation. All persons over twenty-one years of age who present a ticket of admission must be admitted to the legitimate theatre. What possible rationale is there for not imposing a like duty upon the motion picture theatre? Why must the public be permitted to view the presentation at the legitimate theatre, whereas the view of the presentation at the motion picture theatre may be denied?

Admission to places of public entertainment defies classification in the face of the indisputable premise that a mo-

tion picture theatre and a legitimate theatre are equally places of amusement. As stated by Mr. Justice HOLMES in *Buck* v. *Bell*, 274 U. S. 208, the act must bring "within the lines all similarly situated." It is beyond all reason to say that you can draw a line between legitimate theatres and motion picture theatres when the sole object of the act relates to admission to places of public entertainment. The public interest to obtain admission to a motion picture theatre is no less than its interest to obtain admission to a legitimate theatre. There is no reason why admission to one should be more or less onerous than to the other.

In addition to Article 4 of the Civil Rights Law (Section 40) the legislative history of New York overwhelmingly establishes the deep rooted doctrine that legitimate theatres and motion picture theatres both equally fall within the category of places of amusement and are to be treated alike. (*Penal Law*, Sections 484, 485, 514, 515, 517, 711, 1140-a, 2074, 2154; *General Business Law*, Article X-B, Section 168, *et seq.; Town Law*, Section 136[3]; *Village Law*, Section 89[52]; *Administrative Code of the City of New York*, Section C19-154.0).

There is no discernible relation between the classification made by Section 40-b of the Civil Rights Law and the object of compelling admission to places of amusement, nor in fact any basis for the classification at all.

The case of *Western Turf Association* v. *Greenberg*, 204 U. S. 359 (1907), upon which the lower Courts relied for holding the statute constitutional, unmistakably condemns the classification made in the case at bar. It is submitted that said case is in direct conflict with the decision in the case at bar. That case concerned a California statute which made it unlawful to refuse admission to persons over

twenty-one years of age who presented tickets to any opera house, theatre, melodeon, museum, circus caravan, race course, fair, "or other place of public amusement or entertainment." That statute thus expressly included all places of public amusement or entertainment.

The statute present in this case not only did not contain an omnibus clause covering all places of public amusement, but specifically singled out places of amusement to which the act should apply. In the *Western Turf Association* case, defendant urged as a basis of unconstitutionality that the statute denied the equal protection of the laws. The Supreme Court left no doubt about its ruling on that score. It said:

> "The contention that it is unconstitutional as denying to the defendant the equal protection of the laws is without merit, for the statute is applicable alike to all persons, corporations or associations conducting places of public amusement and entertainment" (204 U. S. at p. 363).

It cannot be doubted from the language above quoted that the statute would have been stricken down as denying the equal protection of the laws if it had not applied with equal force "to all * * * places of public amusement and entertainment." The most that can be said for the application of the *Western Turf Association* case, in support of respondent's position, is that the statute in that case was held to be a valid exercise of the police power so long as it applied to all places of entertainment. Although a statute may be clearly within the valid exercise of the police power, if it does not accord equal protection then it must be stricken down as violative of the Fourteenth Amendment (*Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540; *Davis* v. *Massachusetts*, 167 U. S. 43).

Let us proceed further to examine whether there is any necessity for, or evil sought to be corrected by Section 40-b. It is indisputable that there must exist some necessity for the exercise of the police power by the state (*New State Ice Co.* v. *Liebman*, 285 U. S. 262).

In the instant case the record is barren of any necessity for the act. The record establishes the contrary. The uncontradicted proof by persons fully conversant with the subject was that during the past thirty-five years or so there has been but two or three isolated instances of exclusions of ticketholders from theatres (fols. 62-65, 67-70, 78-80, 88-90). Since the turn of the century there have been, to the best of counsel's research, only four reported cases in New York dealing with such a situation. *Collister* v. *Hayman*, 183 N. Y. 250 (1905); *Luxenberg* v. *Keith & Proctor A. Co.*, 64 Misc. 69 (1909); *People ex rel. Burnham* v. *Flynn*, 189 N. Y. 180 (1907); *Woollcott* v. *Shubert*, 217 N. Y. 212 (1916). Each of those cases emphasizes the need of resting control of admission in the theatre operator.

Although there was a complete failure of any showing that any evil or abuse existed with regard to admission, it is not amiss to point out that if it did exist, there is no basis at all for holding that it existed solely with respect to theatres and the other places of amusement as defined and specified by Section 40-b and not with respect to places of amusement excluded from operation of the act. Certainly a law may be directed against an existing evil (*Central Lumber Co.* v. *South Dakota*, 226 U. S. 157). But the law may not be directed to any member of a class, unless the danger is characteristic of the member named (*Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61).

The duty of the State Courts in this case was clear. This Court said in *Mugler* v. *Kansas*, 123 U. S. 623; 8 S. Ct. 273, 297:

> "The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty, indeed, are under a solemn duty, to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge and thereby give effect to the constitution."

The act is as invidious in its present application as it is in its implications. If the classification in this case is sustained then there would be no limit to classifications in any line of endeavor. This power could be used with devastating force to crush any particular phase of a general class of endeavor and thus completely stifle free trade and competition. The manufacturer of men's suits could be hedged in with restraints whereas his next door neighbor who manufactures men's coats could be left to pursue his way free and untrammelled. The classification here present, and those present by implication, are just as oppressive and odious as if they singled out a particular race or nationality for oppression (*Yick Wo* v. *Hopkins*, 118 U. S. 356, 359; *Gaines* v. *Canada*, 305 U. S. 337).

At no time in our history has the equal protection clause been more sacred than it is today. We have seen the utter degradation and ruin caused by despotic wield of power to oppress minorities. And that is the most vicious form of denying equal protection. Incipient in Section 40-b lurks

the vice of crushing minorities, of singling out special groups or types of business for oppression. We should not relax in resisting legislation so insidious and portentous.

CONCLUSION

It is respectfully submitted that this case is one calling for the exercise by this Court of its appellate jurisdiction; and that to such an end a writ of certiorari should issue to the Supreme Court of the State of New York.

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WILLIAM KLEIN,
ADOLPH LUND,
Of Counsel.

APPENDIX

Civil Rights Law

40-b. Wrongful refusal of admission to and ejection from places of public entertainment and amusement.

No person, agency, bureau, corporation, or association, being the owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public entertainment and amusement as hereinafter defined shall refuse to admit to any public performance held at such place any person over the age of twenty-one years who presents a ticket of admission to the performance a reasonable time before the commencement thereof, or shall eject or demand the departure of any such person from such place during the course of the performance, whether or not accompanied by an offer to refund the purchase price or value of the ticket of admission presented by such person; but nothing in this section contained shall be construed to prevent the refusal of admission to or the objection of any person whose conduct or speech thereat or therein is abusive or offensive or of any person engaged in any activity which may tend to a breach of the peace.

The places of public entertainment and amusement within the meaning of this section shall be legitimate theatres, burlesque theatres, music halls, opera houses, concert halls and circuses. Added L. 1941, c. 893.

[Opinions of Supreme Court Follow]

Opinion of Supreme Court, Schenectady County, New York

LAYDEN, *J.*:

The plaintiff herein as the lawful holder of a ticket of admission to the 46th Street Theatre, on the evening of May 27th, 1941, presented his ticket and sought admission to the theatre, where there was being presented at that time the play, "Panama Hattie." It is undisputed that his conduct and speech were not abusive or offensive, and that he was not engaged in any activity tending to a breach of the peace. Admission to the theatre was refused by the agents of the defendants and an offer was made to refund the purchase price of the ticket, this offer being declined by the plaintiff.

Because of the foregoing, the plaintiff seeks to recover the penalty prescribed in Section 41 of the Civil Rights Law of the State of New York in the sum of Five Hundred dollars, basing his right to recover upon the contention that the provisions of Section 40-b of the Civil Rights Law have been violated by the defendants.

The facts are not disputed, but the defendants insist that there can be no recovery herein because of the unconstitutionality of Section 40-b of the Civil Rights Law. That Section reads as follows:

"No person, agency, bureau, corporation or association, being the owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public entertainment and amusement as hereinafter defined, shall refuse to admit to any public performance held at such place, any person over the age of twenty-one years who presents a ticket of admission to the performance, a reasonable time before the commencement thereof, or shall eject or demand the departure of any such person from such place

during the course of the performance, whether or not accompanied by an offer to refund the purchase price or value of the ticket of admission presented by such person; but nothing in this section contained shall be construed to prevent the refusal of admission to or the ejection of any person whose conduct or speech thereat or therein is abusive or offensive or of any person engaged in any activity which may tend to a breach of the peace.

The places of public entertainment and amusement within the meaning of this action shall be legitimate theatres, burlesque theatres, music halls, opera houses, concert halls and circuses."

The defendants first contend that the foregoing is unconstitutional in that it constitutes a deprivation of defendants' property without due process of law. In support of this proposition, they cite the case of Woollcott *v.* Shubert, 217 N. Y. 212, and Tyson *v.* Banton, 273 U. S. 429. In both of these cases, however, the Courts were dealing with rights as they existed at the common law. The rights which are now to be determined are those created by a statutory provision and it would seem that in connection herewith, the single question to be determined is whether there is here a valid exercise of the police power.

To my mind this question seems to have been completely answered in Western Turf Association *v.* Greenberg, 204 U. S. 359, wherein the following appears:

"The contention that it is unconstitutional as denying to the defendant the equal protection of the laws is without merit, for the statute is applicable alike to all persons, corporations or associations conducting places of public amusement or entertainment. Of still less merit is the suggestion that the statute abridges the rights and

privileges of citizens; for a corporation cannot be deemed a citizen within the meaning of the clause of the Constitution of the United States which protects the privileges and immunities of citizens of the United States against being abridged or impaired by the law of a state.

The same observation may be made as to the contention that the statute deprives the defendant of its liberty without due process of law; for, the liberty guaranteed by the Fourteenth Amendment against deprivation without due process of law is the liberty of natural, not artificial, persons. Northwestern Life Insurance Co. *v.* Riggs, 203 U. S. 243. Does the statute deprive the defendant of any property right without due process of law? We answer this question in the negative. Decisions of this court, familiar to all, and which need not be cited, recognize the possession by each state, of powers never surrendered to the General Government; which powers the state except as restrained by its own constitution of the Constitution of the United States, may exert not only for the public health, the public morals and the public safety, but for the general or common good, for the well being, comfort and good order of the people. The enactments of a state, when exerting its power for such purposes, must be respected by this court, if they do not violate rights granted or secured by the Supreme Law of the land. In view of these settled principles, the defendant is not justified in invoking the Constitution of the United States. The statute is only a regulation of places of public entertainment and amusement upon terms of equal and exact justice to every one holding a ticket of admission, and who is not at the time under the influence of liquor, or boisterous in conduct, or of lewd and immoral character. In short, as applied to the plaintiff in error, it is only a regulation compelling it to perform its own contract as evidenced

by tickets of admission issued and sold to parties wishing to attend its race-course. Such a regulation, in itself just, is likewise promotive of peace and good order among those who attend places of public entertainment or amusement. It is neither an arbitrary exertion of the state's inherent or governmental power, nor a violation of any right secured by the Constitution of the United States. The race-course in question being held out as a place of public entertainment and amusement is, by the act of the defendant, so far affected with a public interest that the state may, in the interest of good order and fair dealing, require defendant to perform its engagement to the public, and recognize its own tickets of admission in the hands of persons entitled to claim the benefits of the statute. That such a regulation violates any right of property secured by the Constitution of the United States cannot, for a moment, be admitted. The case requires nothing further to be said. The judgment is affirmed."

This decision also seems to dispose of the defendants' contention that Section 40-b of the Civil Rights Law is unconstitutional in that it constitutes a restraint of defendants' free right to contract.

Only recently it was determined in City of Albany v. Anthony, 262 App. Div. 401, that both liberty and property are subject to the police power of the state under which new burdens may be imposed on property and new restrictions placed on its use when the public welfare demands it.

It is true that there is one essential point of difference between the statute which was passed upon in Western Turf Association *v.* Greenberg, and the one now under consideration. The California Statute under consideration in the United States Supreme Court case provided that it was unlawful to refuse admission to,

"any opera house, theatre, melodeon, museum, circus caravan, race-course, fair, or other place of public amusement or entertainment, to any person over the age of twenty-one years who presents a ticket of admission acquired by purchase, and who demands admission to such place; provided, that any person under the influence of liquor, or who is guilty of boisterous conduct, or any person of lewd or immoral character, may be excluded from any such place of amusement."

That statute included, "other place of public amusement or entertainment." The statute under consideration here expressly limits its application to "legitimate theatres, burlesque theatres, music halls, opera houses, concert halls and circuses."

Because of the failure of the New York Statute to include within its provisions moving picture theatres, the defendants claim that it constitutes a denial to them of the equal protection of the laws.

There remains then for determination whether or not the classification adopted by the Legislature is reasonable, not arbitrary and rests upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. (See, Merchants Refrigerating Co. *v.* Taylor, 275 N. Y. 113.)

While legitimate theatres and moving picture theatres are both places of amusement, still there exists between the two, essential differences, and I am unable to say that the classification adopted by the Legislature is arbitrary, capricious or unreasonable.

Judgment is, therefore, directed in favor of the plaintiff for the sum of Five hundred dollars.

Opinion of Supreme Court, State of New York, Appellate Division, Third Department

HILL, *P. J.*:

Respondent has recovered a judgment against appellants for $500 penalty fixed by Section 41 of the Civil Rights Law. The facts are not in dispute. Respondent purchased a ticket of admission to the 46th Street Theatre in New York City for the evening performance of May 27, 1941. For no reason assigned, when he sought to enter the theatre admission was refused him.

Section 40-b of the Civil Rights Law enacts that persons or corporations conducting a place of entertainment and amusement of the character later defined, are forbidden to "refuse to admit to any public performance held at such place any person over the age of twenty-one years who presents a ticket of admission to the performance a reasonable time before the commencement thereof, * * *; but nothing in this section contained shall be construed to prevent the refusal of admission to or the ejection of any person whose conduct or speech thereat or therein is abusive or offensive or of any person engaged in any activity which may tend to a breach of the peace. The places of public entertainment and amusement within the meaning of this section shall be legitimate theatres, burlesque theatres, music halls, opera houses, concert halls and circuses."

Appellants attack the constitutionality of the statute, urging that it violates their rights to equal protection guaranteed by the Fourteenth Amendment to the Constitution of the United States, and also that it is not a proper exercise of police power, and amounts to the taking of

property without due process, and base an assertion of discrimination because motion picture theatres are not included in the statute.

Under the common law, these appellants would have the right to control their theatre to the same extent as any other private business; they would have the right to decide who to admit (Woollcott *v.* Shubert, 217 N. Y. 212, 216). Earlier similar authorities are, Collister *v.* Hayman (183 N. Y. 250), which dealt with the right to exclude the holder of a ticket purchased from a sidewalk ticket speculator, and People ex rel. Burnham *v.* Flynn (189 N. Y. 180), which determined that a theatre could exclude the dramatic critic Metcalfe. For respondent to sustain his recovery, he must show that the common law rule has been abrogated, either by constitutional provision or a legislative enactment not violative of the Constitution. Munn *v.* Illinois (94 U. S. 113) was a pioneer decision in this country as to certain principles here involved, although the facts differed. It is stated in that opinion "But a mere common law regulation of trade or business may be changed by statute. A person has no property, no vested interest, in any rule of the common law * * *. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself as a rule of conduct may be changed at the will, or even the whim, of the legislature, unless prevented by constitutional limitations" (p. 134). People *v.* King (110 N. Y. 418), dealt with the exclusion of three colored men from a skating rink at Norwich, N. Y. A section of the New York State Penal Code made it a misdemeanor to exclude any citizen from theatres and other public places because of "race, color or previous condition of servitude." It was there determined that the Common Law rule had been abrogated by the Penal Code, which in turn was constitu-

tional. In Woollcott *v.* Shubert (supra) a dramatic critic had been excluded from the theatre, not because of race, creed or color. Our Court of Appeals decided that the Civil Rights Act as then in force (Laws of 1895, Chap. 1042) prevented the exclusion of any person "upon the ground of race, creed or color" but for no other reason, and that plaintiff could be excluded because of the animosity of the owner of the theatre, engendered by adverse criticism. The present Civil Rights Section 40-b, by its terms gives the right of admission to "any person over the age of twenty-one years, who presents a ticket of admission to the performance a reasonable time before the commencement thereof" and whose conduct is not offensive. It is admitted that plaintiff was of the required age, came at a proper time, and was in no way offensive. In Western Turf Association *v.* Greenberg (204 U. S. 359), a race course held out by the proprietor as a place of public entertainment and amusement was "so far affected with the public interest that the state may, in the interest of good order and fair dealing require defendant to perform its engagement to the public, and recognize its own tickets of admission in the hands of persons entitled to claim the benefits of the Statute" (p. 364). The case dealt with a California statute which made it unlawful to refuse admittance to any person over twenty-one years of age who presented a ticket at any opera house, theatre, race course or other named place of public amusement. The question of "race, creed or color" was not involved.

The New York statute is constitutional and sustains plaintiff's right to recover unless the exclusion of motion picture theatres makes it discriminatory. Classifications and exceptions are matters for the legislature, and are declared unconstitutional only where they are arbitrary

and without reason. It was stated upon the argument, and we may take notice that while there are thousands of movie theatres in the state, there are fewer than fifty so-called legitimate theatres, of which these defendants control a majority. A film that is being shown in a movie house is being shown at the same time in hundreds of others. In the legitimate theatre, the actors in person are upon the stage, and the performance which they give is the only one in the city and probably in the state. Plaintiff could see "Panama Hattie" presented by actors in person only at defendants' 46th Street Theatre. "Panama Hattie" in films could be seen in a hundred houses.

When the legislature determined that the common law should be changed as to some places of amusement to make admission mandatory, it could determine the type of amusements to include, and as long as there were grounds and reasons for the classification which was made, the statute is not unconstitutional (Atkins *v.* Hertz, Inc., 261 N. Y. 352; Chamberlain, Inc. *v.* Andrews, 271 N. Y. 1; Woollcott *v.* Shubert, supra).

The judgment should be affirmed.

(31)

Supreme Court of the United States

October Term, 1943.

No. 1005. 87

46TH STREET THEATRE CORPORATION, and SELECT OPERATING CO., INC.,
Petitioners,

vs.

ROBERT WM. CHRISTIE.

MOTION OF ATTORNEY-GENERAL OF THE STATE OF NEW YORK FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF AMICUS CURIAE.

NATHANIEL L. GOLDSTEIN,
Attorney-General of the State of New York, Amicus Curiae.

ORRIN G. JUDD,
Solicitor-General,
WENDELL P. BROWN,
First Assistant Attorney-General,
of Counsel.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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46TH STREET THEATRE CORPORATION, and
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ROBERT WM. CHRISTIE.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

May it Please the Court:

The undersigned, as Attorney-General of the State of New York, respectfully moves this Honorable Court for leave to file the accompanying brief as *amicus curiae*, in opposition to the petition for a writ of certiorari herein.

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SUPREME COURT OF THE UNITED STATES

October Term, 1943.

No. 1005.

46TH STREET THEATRE CORPORATION AND SELECT OPERATING CO., INC.,
Petitioners,
vs.
ROBERT WM. CHRISTIE.

BRIEF OF THE ATTORNEY-GENERAL OF THE STATE OF NEW YORK, AS AMICUS CURIAE, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

Preliminary Statement.

The Attorney-General appeared in this cause in all courts below in support of the constitutionality of the provision of the Civil Rights Law of the State now under attack (R. 11, 56, 69). Such appearance was made under authority of a statute of the State (Executive Law § 68) and pursuant to an order of the trial court granted thereunder (R. 1, 10). He will desire similarly to appear in this Court in the event that the writ is granted.

ARGUMENT.

I.

The statute in question (New York Civil Rights Law, Section 40-b), is not invalid as depriving petitioner of the equal protection of the laws.

In the courts below, petitioner attacked the statute as being violative of both the due process clause and the equal protection clause of the Fourteenth Amendment. In this Court, the contention that the statute was not a proper exercise of the police power and hence constituted a denial of due process has been abandoned. The very definite ruling of this Court in *Western Turf Ass'n.* v. *Greenberg* (1906), 204 U. S. 359, alone would seem to compel retreat from a position so untenable. We think that equally untenable is the petitioner's position in respect to equal protection.

There have been at least four adjudicated cases in this State besides the present one in which proprietors of legitimate theatres have arbitrarily excluded ticket holders from their performances. *Collister* v. *Hayman* (1905), 183 N. Y. 250; *People ex rel. Burnham* v. *Flynn* (1907), 189 N. Y 180; *Luxenberg* v. *Keith & Proctor Amusement Co.* (1909), 64 Misc. 69; *Woollcott* v. *Shubert* (1916), 217 N. Y. 212. Prior to the passage of the present statute, the efforts of these individuals to obtain redress from the courts proved unavailing because of the "absence of an express statute controlling his (the proprietor's) action". *People ex rel. Burnham* v. *Flynn, Supra.*, at page 185. How many other such instances there may have been we do not know. We know that the public press recently carried an account of the exclusion of a critic from a legitimate theatre even af-

ter the present statute had been held by the Trial Court and by the Appellate Division to be valid. In any event, it is sufficient, we think, that the Legislature found an evil to exist in respect to those places of amusement embraced within the terms of the statute and that that evil did not exist in respect to those not so embraced.

Nothing is more firmly established than that the equal protection clause of the Fourteenth Amendment does not take from the states the power to classify for the purpose of legislation under the police power. It has often been said that the Legislature has wide discretion in such matters and that its acts will be condemned only if purely arbitrary. *Whitney* v. *California* (1927), 274 U. S. 357, 369. The statement is frequently found in the opinions of this Court that distinctions made by the Legislature will not be held invalid if any state of facts reasonably can be conceived that would sustain them. *Metropolitan Co.* v. *Brownell* (1935), 294 U. S. 580, 584. It is also a well recognized principle that the Legislature is not bound to extend its police regulations to all cases which they may properly reach. It has been said that, in such case, the Legislature may "proceed cautiously, step by step", and that "if an evil is specially experienced in a particular branch of business" it is not necessary that the prohibition "should be couched in all-embracing terms." *Radice* v. *New York* (1924), 264 U. S. 292, 297.

Petitioner particularly stresses the fact that motion picture theatres are not embraced within the terms of the statute. Differences in the two types of theatre are readily apparent. Some of these differences have been pointed out in the opinion of the Presiding Justice of the Appellate Division (R. 60). But, of even greater significance upon the present question is the fact that the Legislature has found

an abuse to exist in respect to the legitimate theatre which does not exist in respect to the motion picture theatre. That, in and of itself, is, we submit, a sufficient and valid reason for making the distinction that has been made.

Conclusion.

To avoid possible repetition of a more detailed argument which we assume will be made by counsel for the respondent, this brief has been restricted to a very brief discussion of the subject. We think, however, that the observations which we have made are sufficient, without more, to convince the Court that the present statute does not deprive petitioner of the equal protection of the laws and that the petition should be denied.

Dated: June 5, 1944.

Respectfully submitted,

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